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United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

November 22, 1976

Memorandum

To: Ambassador T. V. Learson, Chairman, NSC Interagency Task Force on the Law of the Sea, Department of State

From: for Leigh S. Ratiner, Administrator, Ocean Mining Administration

Subject: Draft Options Paper for Administration Position on Ocean Mining Legislation

In response to your request at the November 16 Executive Group meeting, this memorandum sets forth the Interior Department's views on State Department's draft options paper concerning ocean mining legislation.

Introductory Discussion

Recognizing that the NSC has requested a paper addressing only the narrow question of an Administration position on ocean mining legislation, we believe nevertheless that it is extremely important for the introductory section of the paper to provide background on the full range of problems involved in this decision. The background section, therefore, should explain the key strategic difficulty in Committee I--the perceptions of the developing countries--which was elaborated in some detail in the U.S. Delegation's report from the last session. It should also describe the relationship of the Committee I negotiations to the rest of the Conference, including a list of other national law of the sea objectives.

Second, the introductory material must include a clear statement of our national interests in the development of a domestic ocean mining capability. The discussion of the status of commercial ocean mining activities now contained in the State Department draft is highly inadequate because it does not provide the reader with a comprehensive under-

Classified by Wm.Newlin, in NSC-D/LOS #640 of 11-16-76

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standing of the investment uncertainties now facing the industry. While there is obviously some agency disagreement concerning the extent to which these uncertainties are delaying ocean mining investment, the paper must present the industry's perspective in order to allow accurate evaluations of probable industry and congressional support for individual legislative options.

Accordingly, the discussion should include fair presentations of industry's arguments that legislation should resolve investment instability arising from a) most nations' interpretations of the principle of the common heritage of mankind, b) the absence of access to specified ore deposits upon which investments will be based under a high seas regime, and c) the possibility that investments made now will be impaired through later U.S. agreement to a law of the sea treaty.

Third, the introductory discussion of congressional considerations should provide the reader with a capsulized history of the Administration's relations with Congress on the issue of ocean mining legislation. Unless the reader is aware of the statements we have made in the past to Congress, it will be impossible to evaluate likely congressional response to a new position. In this connection, it would be desirable to apprise the reader of the congressional sentiment reflected in the letter to the President of September 9, 1976, signed by 20 Senators.

Interim Policy Alternatives

A new section should be added to the Department of State paper which would set forth fundamental interim policy alternatives that have been considered for resolving the complex of problems described in the background discussion. In our view, these are the following:

--Consider and evaluate, particularly from a congressional and industry perspective, additional substantive concessions the U.S. might make in Committee I in order to break the deadlock in the negotiation.

--Maintain firmly present U.S. positions into the next session to demonstrate to LDC's that we have no more flexibility.

--Withdraw willingness to accept the parallel system as a clear signal that it will not pay to await new Administration flexibility.

--Attempt to separate the Committee I negotiation from the rest of the Conference, and move to finalize a Committee II and III treaty.

--Begin negotiations among industrialized countries on an interim ocean mining agreement.

--Adopt a new interim policy that commits the U.S. to defend its high seas rights, including ocean mining.

--Support ocean mining legislation.

Each of these options should be briefly explained and whatever difficulties they raise discussed. Since the remainder of the paper will address the question of legislation, that issue which generated the request for the paper, it would be unnecessary to include detailed pros and cons under these fundamental strategy choices. The analysis of legislative options would be totally incomplete, however, unless the alternatives to legislation were presented at the forefront of the paper.

Procedural Options on Support for Legislation

The Interior Department favors the option of strong public Administration support for immediate enactment of ocean mining legislation because we believe that a public position seeking to delay passage until after the next session is no longer credible to the international community. The latter is a position we have adopted, and retreated from, on previous occasions. As a practical matter, however, we seriously doubt that legislation could be fully enacted by the May session. Therefore, we request that Option 4 under the "Options on Support of Legislation" in the State Department draft include a sub-option of private Executive/congressional cooperation to ensure that enactment by both houses is postponed until the end of the spring session of the Conference or passage by both houses with a delay in the conference committee.

Substantive Options

Interior does not believe that the substantive options on legislation in the State Department paper include all of the viable approaches. We believe this section can be vastly improved by drafting several introductory paragraphs that describe the various features of legislation to be considered. As we understand it, all of the options assume an express provision that a subsequent treaty will supersede the

legislation. And, presumably, all of the options assume an effective system for protecting the marine environment. On the other hand, none of the options set forth details of resource management provisions in legislation, and the paper should explain that the NSC Task Force is deferring to appropriately experienced agencies on these matters.

The features which might be included in various approaches and about which there may be disagreement are:

--Establishment of a regulatory regime that can permanently be applied to ocean mining in the absence of a treaty.

--Provision for exclusive rights vis-a-vis other U.S. nationals to mine a specific site.

--Investment protection features.

--Delay in implementing permanent regulation of commercial exploitation.

--Express provision for a moratorium on commercial exploitation.

--Express provision for the provisional application of a treaty and administrative arrangements for the provisional period.

--Anticipation of international obligations likely to be imposed by a treaty.

--Provision for reciprocal recognition of similar actions taken by other countries.

These features form a checklist upon which individual legislative options can be composed. We are convinced that the substantive options presented must be full, package options in order to permit knowledgeable policy decisions. The task of maximizing all of our sometimes conflicting national objectives in legislation will require a delicate balance and evaluation of the totality of the approach. Options which are being seriously considered, therefore, must be sufficiently comprehensive to allow reasoned comparison with other approaches.

In addition to any other options which may be supported by agencies, we request that the following option be included in the paper:

OPTION___: Contingency Legislation

1. Permanency

Establish a domestic regulatory regime for ocean mining exploration and explcitation; the details of resource management provisions would not be included in the legislation, but would be promulgated later in rules and regulations.

2. Exclusive Rights

Provide licensees with the right to mine specific ore deposits free from any interference by other U.S. nationals; this approach would provide security of tenure similar to exclusive property rights in the resource, but is less troublesome from an international law standpoint, and may be more cosmetically appealing to the international community.

3. Investment Protection

Establish either a Government insurance program of limited liability covering only the risk that investments are substantially impaired as a result of U.S. agreement to a treaty regime, OR

Provide an obligation on the U.S. to obtain equivalent legal rights for licensees in a treaty regime; if the U.S. was unable to obtain grandfather rights in the treaty for prior investments, licensees would have a cause of action against the U.S. under the Fifth Amendment.

4. Delay in Implementation

Interim features of the bill, including issuance of an exploration permit and monitoring of operations, would go into effect immediately; promulgation of rules and regulations would be delayed; exploration permits would only be issued to (those few) miners who could demonstrate that they would achieve commercial-scale recovery by a specified date (say 1985).

5. Moratorium on Exploitation

Include an express moratorium on commercial exploitation until 1980; this date corresponds to the time when presently active firms will be ready to make large-scale capital commitments (around $500 million). A moratorium on exploitation until 1980 would not deter planned commercial exploration activities during that period, and would also ensure that interim investments would be limited to exploration costs (around $100 million per company), thus limiting any U.S. liability under the investment protection provisions.

6. Provisional Application

Establish the procedure for congressional approval of provisional application of the treaty; authorize the Executive Branch to carry out certain administrative functions to ensure smooth transition to a provisional regime.

7. Specific International Obligations

Include no obligations on licensees in advance of entry into force of treaty; authorize Executive Branch to take whatever measures are necessary to ensure licensees comply with obligations under any provisional treaty regime that comes into effect for the U.S.

8. Recognition of Similar Actions by Others

Authorize the conclusion of arrangements with other countries for reciprocal recognition of similar rights granted their nationals.

PROS:

--Is sufficiently serious to convince LDC's that we are prepared to proceed with ocean mining in the absence of a treaty because it provides for this contingency in its:

a) permanent regulatory regime; legislation which establishes only a temporary, interim domestic system would perpetuate LDC bargaining leverage because it would show that we are still reluctant to have exploitation occur without a treaty.

b) reciprocating States provisions, since knowledgeable LDC's recognize that a concerted industrialized country approach to ocean mining represents a truly viable alternative to an LOS treaty.

c) investment protection features, which will be understood as indispensable to a full-fledged development effort by U.S. companies.

--At the same time, it avoids the charge by other countries that we are preempting the negotiations because of its provisions for:

a) a moratorium on commercial exploitation until 1980, which clearly gives the Conference time to reach a successful result; although many LDC's will recognize that exploitation cannot begin until the 1980's anyway, the moratorium will assist moderates in toning down Group of 77 reaction to U.S. legislation.

b) delayed implementation of the permanent resource management features; since the bill would contain no detailed regulatory provisions and rules and regulations would not be promulgated until 1980, we can legitimately present the action as not in any way influencing the substance of the negotiations during the interim period.

c) limitation on issuing exploration permits to those few serious commercial ventures; this provision can be presented as manifesting considerable U.S. restraint.

d) noninterference, rather than exclusive property rights; formulation of the rights granted in terms of noninterference by U.S. nationals avoids claims that we are appropriating the common heritage of mankind.

e) express provision for the contingency that a treaty is successfully concluded and provisionally applied, which demonstrates that we are placing equal emphasis on a Conference success as on a failure.

--It gives U.S. ocean miners necessary security of tenure through an assured right to mine their preferred deposits, free from interference by U.S. nationals and nationals of reciprocating States; however, this right is not a property right in the deep seabed or resources and therefore is less susceptible to being expanded by other nations to territorial status.

--Either limited insurance coverage or a guarantee of grandfather rights will remove the most important obstacle to investment stability--the concern that the LOS treaty will impair prior investments:

a) under the insurance option, U.S. liability would be limited prior to 1980 (the period in a treaty will either be concluded or not) to exploration expenditures (around $100 per company for perhaps four licensees); moreover, liability can be further limited by requirements of private insurance market participation, reasonable premiums and deductions for remaining commercial value of investment; the U.S. has established a myriad of Government-sponsored insurance programs, and this approach would not create undesirable precedents.

b) under the grandfather rights option, liability would only arise after a judicial determination on a Constitutional claim under the Fifth Amendment; moreover, possible liability would also be limited as a practical matter to exploration costs; finally, provision for some form of grandfather rights in the treaty has already been discussed in the negotiations (key LDC leaders are not adverse to the concept), and legislating this requirement would give us sufficient bargaining leverage to satisfy this objective.

CONS:

--Establishment of a permanent regulatory system, even if delayed in implementation, risks overly adverse LDC reaction and disruption of the Conference.

--Noninterference rights are sufficiently similar to other kinds of exclusive rights as to inspire expansive territorial claims by other countries.

--The U.S. Government should not subsidize its private industry through political insurance of this kind; even with limited liability, an insurance program raises numerous administrative problems that are unwarranted under the circumstances.

--An obligation to acquire grandfather rights may establish an undesirable precedent of limiting the power of the Executive to conduct foreign policy.

--A moratorium on commercial exploitation will be counterproductive, since LDC's know that exploitation cannot occur until the 1980's and will view it as a sham.

--Unless the bill provides for some anticipated treaty obligations, such as revenue sharing, the international community will believe we have given up on the Conference.

--Provisional application raises many legal problems and need not be dealt with now; Congress will oppose this attempt to restrict its future prerogatives.